(3)

Supreme Court, U.S.
FILED
FEB 6 2001
OFFICE OF THE CLERK

No. 00-960

In the Supreme Court of the United States

EDWIN F. VIRGIN, SR., et al.,
Petitioners,

v.

COUNTY OF SAN LUIS OBISPO, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITIONERS' REPLY BRIEF

WILLIAM S. WALTER
Counsel of Record
WALTER & BORNHOLDT
679 MONTEREY STREET
SAN LUIS OBISPO, CA 93401
(805) 541-6601

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

14 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Artfully Dodging The Issue (Bullet) -- State Court Efforts To Avoid Federal Property Rights Claims Through Creating The Impossible Standard of Review. 1

A. Introduction 1

B. Neither The County, The State Appellate Court, Nor The Ninth Circuit Disputes That The Virgins Have Lost Valuable Property Rights Protected By The Fifth And Fourteenth Amendments 3

C. The Standard Of Review Applied By The State Appellate Court Negates And Circumvents Constitutional Remedies Required By This Court 4

D. The County's Overstatement Of The Ninth Circuit Holding And Restatement Of The State Appellate Court's Standard Of Review Do Not Resolve These Issues 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases **Page(s)**

Agins v. City of Tiburon,
100 S.Ct. 2138 (1980) 4

Bush v. Palm Beach County Canvassing Board, et al.,
531 U.S. ___, (2000)
(No. 00-836, sl.opn., p. 6.) 7

Chevron U.S.A., Inc. v. Superior Court,
4 Cal.App.4th 544,
5 Cal.Rptr.2d 674 (Cal. 1992) 2

City of Monterey v. Del Monte Dunes,
___ U.S. ___, 119 S.Ct. 1624,
143 L.Ed. 882 (1999) 1

Dolan v. City of Tigard,
512 U.S. 374, 114 S.Ct. 2309,
129 L.Ed.2d 304 (1994) 1

First English Evan. Luth. Ch. v.
Los Angeles County,
107 S.Ct. 2378 (1987) 1, 2, 4, 8

Hensler v. City of Glendale,
8 Cal.4th 1, 6, 876 P.2d 1043,
32 Cal.Rptr. 244 (Cal. 1994) 5

Lakeview Meadows Ranch v. County
of Santa Clara,
27 Cal.App.4th 593 (Cal. 1994) 3

Minnesota v. National Tea Co.,
309 U.S. 551 (1940) 7

Nollan v. California Coastal Comm'n,
483 U.S. 815, 107 S.Ct. 3141,
97 L.Ed.2d 677 (1987) 1

Rodney F. v. Karen M.,
61 Cal.App.4th 233 (1998) 7

San Diego Gas & Electric Co. v. City of San Diego,
450 U.S. 621, 101 S.Ct. 1287 (1981) 4

Topanga Ass'n. for a Scenic Community
v. County of Los Angeles,
11 Cal.3d 506, 113 Cal.Rptr.
836 (Cal. 1974) 5

Village of Willowbrook v. Olech,
120 S.Ct. 1073 (2000) 1

Virgin v. County of San Luis Obispo,
201 F3d 1141 (9th Cir., 2000) 6

Constitution and Statutes

Fifth Amendment to the Constitution
Of the United States 3

Fourteenth Amendment to the Constitution
of the United States 3

California Code of Civil Procedure
§ 437c(a) 2

California Code of Civil Procedure
§ 1094.5 5

California Government Code
§ 664210, *et seq.* 3

California Government Code
§ 66473.5 4

California Government Code
§ 66499.30(a), (b), (c) 3

California Government Code
§ 66499.30(d) 3

California Government Code
§ 66499.31 3

California Government Code
§ 66499.32(a) 4

California Government Code
§ 66499.32(b) 3

ARGUMENT

I.

Artfully Dodging The Issue (Bullet) – State Court Efforts To Avoid Federal Property Rights Claims Through Creating The Impossible Standard of Review.

A. Introduction.

The County's thoughtful brief in opposition artfully, although unconvincingly, attempts to avoid the issue of how an impossible state court standard of review can thwart the ramifications of this Court's efforts to protect property rights. *First English Evan. Luth. Ch. v. Los Angeles County*, 107 S.Ct. 2378 (1987), *Nollan v. California Coastal Comm'n*, 483 U.S. 815, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), *City of Monterey v. Del Monte Dunes*, ___ U.S. ___, 119 S.Ct. 1624, 143 L.Ed. 882, 905 (1999), and *Village of Willowbrook v. Olech*, 120 S.Ct. 1073 (2000).

Beyond doubt, property owners in many jurisdictions are grateful for this Court's efforts to provide a modicum of protection which would not otherwise exist. Nonetheless, substantial judicial work remains to assure that property owners can enjoy those property rights secured by the Constitution and laws of the United States regardless of where their property is located.

The Virgins respectfully submit that a key to striking the proper balance between public needs and private rights can be advanced by addressing the standard of review of

federal constitutional claims which are joined with state administrative law remedies.

The central fallacy in the state appellate court's treatment of the Virgins' property rights is the assumption that federal constitutional property rights claims can be summarily resolved by applying a state administrative law standard of review which excludes consideration of the property owner's evidence, even if undisputed, and any inferences in favor of the property owner. No one would doubt that due process would be violated if federal constitutional claims were summarily dismissed by demurrer without assuming that the factual allegations are true, as in the *First English* case. Similarly, no one would doubt that due process would be violated if federal property rights claims are dismissed through summary judgment where the property owner has presented evidence of a triable issue of fact.[1] Instead, the state appellate court resolved all issues in the case by applying its own articulation of a standard of review which effectively makes it impossible to have a court consider evidence supporting the property owner's claims.

---

[1] The state appellate court summarily dismissed the Virgins federal property rights claims not by applying the summary judgment standard of review pursuant to California Code of Civil Procedure § 437c(a). The governmental defendant has the burden of demonstrating that there are no material facts requiring trial on any of them. *Chevron U.S.A., Inc. v. Superior Court*, 4 Cal.App.4th 544, 548, 5 Cal.Rptr.2d 674 (Cal. 1992).

B. Neither The County, The State Appellate Court, Nor The Ninth Circuit Disputes That The Virgins Have Lost Valuable Property Rights Protected By The Fifth And Fourteenth Amendments.

Two critical factors are not disputed in the County brief in opposition, the state appellate court decision, or the Ninth Circuit Court of Appeal decision:

(1) The Virgins had separate and distinct legal parcels consisting of intact federal patents, and portions of patents legally divided by deeds; and

(2) That these separate legal parcels are fundamental incidents of ownership which constitute "property" for Fifth and Fourteenth amendment purposes.

There is no dispute regarding the Virgins' property rights which the state appellate court held to be extinguished because it is well settled under California law that a federal land patent creates a legal parcel. *Lakeview Meadows Ranch v. County of Santa Clara*, 27 Cal.App.4th 593, 598 (Cal. 1994).[2]

---

[2] The California Subdivision Map Act regulates the creation of legal parcels, but does not apply to legal lots created before the enactment of state statutes and local ordinances. California Government Code § 664210, *et seq.* Federal patents and portions thereof divided by deed are exempt from the provisions of the Map Act. *Id.*, § 66499.30(d). The Act expressly makes it illegal to sell, lease, or finance separate parcels without first complying with the Map Act. *Id.*, § 66499.30(a),(b),(c). Violation of the Map Act is punishable as a misdemeanor. *Id.*, § 66499.31. Any deed of property in violation of the Map Act is voidable [*Id.*, § 66499.32(a)], and subjects the owner to damages claims. *Id.*, § 66499.32(b). In this case, no further subdivision could be

The Virgins complain because fundamental incidents of ownership to convey, or bequest, legally separate portions of their property without the threat of criminal sanction and civil penalty have been summarily extinguished by expressly not reviewing any evidence against such extinguishment, even when that evidence was undisputed.

C. The Standard Of Review Applied By The State Appellate Court Negates And Circumvents Constitutional Remedies Required By This Court.

This Court struggled extensively with the constitutional "remedy issue" in *Agins v. City of Tiburon*, 100 S.Ct. 2138 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 101 S.Ct. 1287 (1981), and then resolved the issue in *First English, supra.*, holding that the invalidation of government action in lieu of damages is constitutionally inadequate. The "remedy issue," however, will never be completely resolved until the standard of review issue is also addressed. The standard of review applied by the state appellate court effectively evades the holding of *First English*, by creating an evidentiary bar to any remedy other than invalidation.[3]

For the property owner in California, no compensation remedy is available unless the administrative mandamus remedy under state law is first sought within short state law

---

approved on the Virgins' properties since it would not comply with the minimum parcel sizes established by the County General Plan. Any new subdivision must be found to be consistent with the applicable General Plan standards. *Id.*, § 66473.5.

[3] The state appellate court disregarded any heightened standard of review.

created statutes of limitations. *Hensler v. City of Glendale*, 8 Cal.4th 1, 6, 876 P.2d 1043, 32 Cal.Rptr. 244 (Cal. 1994). Since federal courts will typically abstain from exercising jurisdiction over federal takings, civil rights, equal protection, and due process claims until the state court acts upon those claims, property owners such as the Virgins join their federal claims as a practical necessity with state created administrative law remedies.[4]

The state appellate court's decision in this matter illustrates how federal constitutional claims joined with state administrative law claims are summarily dismissed through the application of a state created administrative law standard of review. Thus, state courts can completely avoid the consideration of federal constitutional claims joined in state court actions by using a standard of review which completely defeats the property owners ability to prove their federal constitutional claims.

D. The County's Overstatement Of The Ninth Circuit Holding And Restatement Of The State Appellate Court's Standard Of Review Do Not Resolve These Issues.

The County brief in opposition attempts to avoid the ramifications of these issues by overstating the claims considered by the Ninth Circuit, and restating on different terms the express standard of review used by the state appellate court.

---

[4] See, for example, California Code of Civil Procedure § 1094.5, which requires that government action be sustained if it is supported by findings and the findings are supported by some substantial evidence. *Topanga Ass'n. for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 113 Cal.Rptr. 836 (Cal. 1974).

The Ninth Circuit did not have any federal takings, due process, equal protection, or civil rights claims pending before it. The case before the Ninth Circuit was a very narrow jurisdictional issue concerning whether or not federal courts have jurisdiction against state efforts to impair the efficacy of federal land patents. Certainly, the Ninth Circuit knew that these federal claims were pending in state court, and therefore, the Ninth Circuit opined that the Virgins' appropriate remedy was to pursue those claims through the state courts and then petition for writ of certiorari. *Virgin v. County of San Luis Obispo*, 201 F3d 1141, at 1145 (9th Cir., 2000).

The Ninth Circuit never pretended to resolve all federal law issues, contrary to the County's assertions, and for that reason suggested that after the litigation through the state courts had been resolved, the appropriate remedy was to petition for this writ. *Id.* Obviously, the Ninth Circuit would never have suggested petitioning this Court for certiorari if it had viewed all federal law claims as being completely resolved by its decision.

The County brief in opposition attempts to soften the state appellate court's express statement of the standard of review which it applied. The state appellate court in no uncertain terms stated its task:

> Our task on appeal is to determine whether the county's decision is supported by the findings and whether the findings made by the county are supported by substantial evidence. (Code Civ. Proc., § 1094.5, subds. (b)-(c).) Petition, Appendix B, p. 8a.

Thus, the state appellate court goes directly to the County's decision and applies a substantial evidence test necessarily treating the County as the "prevailing party" in its own administrative action, which the Virgins continue to view as draconian:

> The substantial evidence rule requires that we look only to the evidence supporting the prevailing party. (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.) We discard evidence unfavorable to the prevailing party as not having sufficient verity to be accepted by the trier of fact. (*Ibid.*) Where the trier of fact has drawn reasonable inferences from the evidence, we have no power to draw different inferences, even though different inferences may also be reasonable. (*Ibid.*) The trier of fact is not required to believe even uncontradicted evidence. (*Ibid.*) Petition, Appendix B, p. 8a.

That the state appellate court applied this standard of review is the only explanation for its failure to consider any evidence favorable to the property owners.

If this Court views the state appellate court's standard of review as ambiguous, then, as this Court has recently noted, it would be appropriate to remand the matter to the state appellate court.[5]

---

[5] ". . . it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases." *Minnesota v.*

CONCLUSION

This case, therefore, is about the due process implications of dismissing federal constitutional claims based upon an extreme state law standard of review for a particular and limited state law remedy -- administrative mandamus -- which this Court in *First English* recognized as being an inadequate constitutional remedy. If the constitutional remedy of setting aside a local government's decision is constitutionally inadequate to resolve federal takings claims, then, most certainly, the state standard of review for a constitutionally incomplete remedy cannot be used to summarily dismiss federal constitutional claims.

/s/_____
WILLIAM S. WALTER, ESQ.
Counsel of Record
Walter & Bornholdt
679 Monterey Street
San Luis Obispo, CA 93401
(805) 541-6601

Counsel for Petitioners

National Tea Co., 309 U.S. 551, 555 (1940), cited in *Bush v. Palm Beach County Canvassing Board, et al.*, 531 U.S. ___, (2000) (No. 00-836, sl.opn., p. 6.)